cases like this one." Pet. App. 27.

The Court of Appeals was, of course, correct in recognizing a distinction between the reinstatement rights of economic strikers and unfair labor strikers. Its error lay in its excessively narrow view of the rights of economic strikers. For this Court's opinion in *Mackay* demonstrates that economic strikers who are the victims of discriminatory treatment in violation of §§ 8(a)(1)&(3) are, by reason of their status as discriminatees, entitled to reinstatement as the remedy for the employer's unfair labor practice without regard to whether they have been replaced.

In *Mackay*, 304 U.S. at 345-346, the Court first noted that:

> "[I]t [was not] an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although § 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment in order to create places for them."

But it then went on to state (*id.* at 346):

> "[T]he claim put forward [here] is that the unfair labor practice indulged by the [employer] was discrimination in reinstating striking employes by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the Act, the status of employes. Any such discrimination in putting them back to work is, therefore, prohibited by § 8."

And on the subject of the proper remedy for illegal discrimination during a strike the Court squarely held (*id.* at 348):

> "The relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress. On the basis of the findings, five men who took part in the strike, were discriminated against in connection with a blanket offer to reinstate striking employes. The Board enjoined further discrimination against employes by reason of union affiliation but it could not grant complete relief in respect of the five men short of ordering that the discrimination be neutralized by their being given their former positions and reimbursed for the loss due to their lack of employment consequent upon [their employer's] discrimination."

From this holding that a striker who is discriminated against when he applies for work is entitled to reinstatement even though that may require displacement of other employees, it follows, *a fortiori,* that a striker who is discriminatorily discharged is also entitled to reinstatement. For the discriminatory discharge of a striker is an anticipatory refusal to reinstate. It is an action which announces, contrary to the injunction of § 2(3), that the employer refuses to recognize the striker's continuing status as an employee.

The right to hire permanent replacements for economic strikers, in other words, is a shield which allows an employer, "guilty of no act denounced by the statute . . . to protect and continue his business" in the face of a strike for better terms and conditions of employment (*Mackay,* 304 U.S. at 345-346); it is not a sword which allows an

employer to punish his employees for having engaged in concerted activity protected by § 7. For *Mackay* teaches that a striker-discriminatee, no less than the discriminatee discharged while working at his job (see, e.g., *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46, 47-48) is entitled to reinstatement without regard to whether he has been replaced. In both instances the question posed is "what is the proper remedy for a violation of §§ 8(a)(1)&(3)?" And the answer is the one given in *Mackay* and reaffirmed in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 187-188, 194:

> "Reinstatement is the conventional correction for discriminatory discharges . . . It could not be seriously denied that to require discrimination in hiring or firing to be 'neutralized,' National Labor Relations Bd. v. Mackay Radio & Teleg. Co., 304 U.S. 333, 348, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an 'affirmative action' which 'will effectuate the policies of this Act.'
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> According to the experience revealed by the Board's decisions, the effectuation of [the] important policy . . . of the maintenance and promotion of industrial peace . . . generally requires not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination."

Indeed the provision of a lesser right to reinstatement to a striker-discriminatee than to other discriminatees would stand the Act on its head. The loss of his job is the most serious sanction that can be inflicted upon an em-

ployee. Thus a discriminatee who is not granted reinstatement has been denied an effective remedy for the wrong done to him. In light of Congress's "repeated solicitude for the right to strike" (*Erie Resistor*, 373 U.S. at 234) it would be anomalous, to say the very least, if the Act were read to grant all discriminatees, other than striker-discriminatees, the "complete relief" necessary to "neutralize" the employer's §§ 8(a)(1)&(3) violation (*Mackay*, 304 U.S. at 348). And as *Mackay* shows, that is not the way this Court has read the Act.

The distinction between the right to reinstatement of replaced economic strikers and striker-discriminatees lies in the fact that the former are not the victims of any unfair labor practice. As to them, the employer retains his common law right to refuse employment for any business reason, including the reason that their jobs have been filled by another. But an employer forfeits his right to hire and fire as he sees fit when he violates §§ 8(a)(1)&(3) of the Act. At that point his right to run his business is subordinated to the remedial purposes of the Act. As this Court stated in *Mackay*, 304 U.S. at 348:

> "We have held that, in the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife. National Labor Relations Bd v. Jones & L. Steel Corp., 301 U.S. 1, 48. The Board's order there sustained required the reinstatement of discharged employes. The requirement interfered with freedom of contract which the employer would have enjoyed except for the mandate of the statute. The provision of the Act continuing the relationship of employer and employe in the case of

> a strike as a consequence of, or in connection with, a current labor dispute is a regulation of the same sort and within the principle of our decision."

In short, it is only in determining whether an act not motivated by anti-union animus is an unfair labor practice that considerations of "business justification" come into play. This is plain not only from *Jones & Laughlin* and *Mackay*, but on the face of the opinion in *NLRB* v. *Fleetwood Trailer*, 389 U.S. 375, the case relied upon by the court below. Pet. App. 28. The critical sentence in that decision is that "Unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications' *he is guilty of an unfair labor practice, NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34." *Fleetwood Trailer*, 389 U.S. at 378; emphasis supplied. Thus, *Fleetwood Trailer* does not speak to the remedial question presented here at all. The precedent in point is *Mackay* and it requires affirmance of the Board order of reinstatement for the four striker-discriminatees.

2. In the instant case the Employer committed not simply one unfair labor practice that required a remedial order of reinstatement but two. The first was the discriminatory discharges of employees Robert and Manuel Vasquez, Richard Dicus and Salvadore Casillas discussed above. The second, to which we turn now, was the refusal to honor the four discharged employees' request for reinstatement at a time when they were unfair labor practice strikers.

(a) The law is, as the Court of Appeals acknowledged, that "Unfair labor practice strikers are entitled upon re-

quest to reinstatement with back pay, even if the employer has in the meantime hired permanent replacements. See Mastro Plastics Corp. v. NLRB, 1956, 350 U.S. 270, 278." Pet. App. 26. The Act safeguards this "unconditional" right to reinstatement where the employer is "guilty of an unfair labor practice" (*Remington Rand*, 130 F.2d at 928) because "failure of the Board to sustain the right to strike against . . . illegal . . . conduct would seriously undermine the primary objectives of the Labor Act. See N.L.R.B. v. International Rice Milling Co. 341 US 665, 673." (*Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 278). As Judge Learned Hand stated in the leading case of *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 871 (C.A. 2), *cert. denied*, 304 U.S. 576:

> "The act expressly preserves the right to strike, section 13, 29 U.S.C.A. § 163, and that includes a strike for [an unlawful refusal] to negotiate as well as any other. It is a remedy parallel with recourse to the Labor Board; its use, when unsuccessful, but in a controversy where the men are right, ought not therefore to be prejudicial to them. Moreover—and this is conclusive—the remedy which the act provides expressly includes restatement as a part of it."

Thus an unfair labor practice strike, to use Judge Hand's words, is a strike "at least one cause" of which is a § 8(a) violation. *Remington Rand*, 94 F.2d at 872. Following accepted principles that violation is a "tort—a 'substraction' [and] it rest[s] upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune." *Ibid.* And as Judge Hand added in the second *Remington Rand* case (130 F.2d at 928, n. 8):

> "[W]here a strike which initially involved no unfair labor practice is prolonged or aggravated by an employer's unfair labor practice, the same rule applies as where the strike is the *result* of an unfair labor practice, and the employer is bound to reinstate all strikers and discharge all those hired to replace them during the strike."

(b) On October 4, 1967 the Company's employees struck for the purpose of "pressur[ing] the Company into holding a consent election." Pet. App. 21-22, 23. On October 5, 1967 the Employer unlawfully discharged employees Robert and Manuel Vasquez, Dicus and Casillas. Pet. App. 22, 25. These discharges added a new element to the dispute. For, on and after October 8, 1967 the strikers sought not merely an election but their reinstatement. Indeed, as shown by the repeated visits of the discriminatees to Company President McEwan to discuss their employment status, the reinstatement issue became a major factor in the strike. Pet. App. 69, 70. The Board, therefore, found that "the discharge of the [four] employees, which had the natural effect of tending to prolong the strike, converted what had commenced as an economic walkout into an unfair labor strike." Pet. App. 26, 41.

In light of the principles discussed above, that finding was plainly correct. The question of whether the employer would, as required by § 2(3) of the Act, recognize the strikers as his employees, was a principle subject of contention. Where there had been one source of disagreement before (the holding of a consent election) there were now two (the election and the employee status of the strikers), and the second went to the strikers' most vital interest—their very

right to a job. Thus, it is manifest that the unfair labor practice committed here "aggravated" the strike. *Remington Rand,* 130 F.2d at 928. Indeed, the instant case is precisely parallel to *Remington Rand.* For, there as here, the employer "by its immediate discharge of the strikers and attempted abnegation of the employment relationship, was guilty of an unfair labor practice." *Ibid.* Moreover, there can be no doubt that the unfair labor practice "prolonged" the strike. The employees offered to return to work but the Employer refused to accept their application for reinstatement because it no longer regarded them as its employees. Pet. App. 37-38. Thus, under the accepted test (compare Pet. App. 26) on and after October 5, 1967 the strike in question here was an unfair labor practice strike.

(c) The Court of Appeals reasoned that:

> "The strikers whose discharges constituted the unfair labor practice were, at the time of their discharge, protesting only the original [economic] grievance. Any strikers subsequently discharged might legitimately be considered unfair labor practice strikers, for they would be protesting not only the original grievance but also the subsequent unfair labor practice. The initially discharged strikers were obviously not protesting their own discharges, which had not yet occurred. To assimilate their status to that of their co-workers who had not yet been discharged would eliminate the distinction between the economic-striker-reinstatement rule (*Mackay Radio & Telegraph*) and the unfair-labor-practice-striker-reinstatement rule (*Mastro Plastics*) in cases like this one." Pet. App. 27.

In other words, the premise of the decision below is that unlawfully discharged economic strikers are frozen by their

discharge in their status as economic strikers subject to permanent replacement, and cannot be considered unfair labor practice strikers even though that discharge converts the strike into an unfair labor practice strike, and even though the striker-discriminatees continue to participate in the strike after it has been thus transformed.

But this theory assigns an unwarranted consequence to the discriminatory discharges. The Court of Appeals viewed the situation presented here as analagous to that presented in *NLRB* v. *Frick Co.*, 397 F.2d 956 (C.A. 3). See Pet. App. 28. In *Frick*, 397 F.2d at 956, the Third Circuit held that strikers permanently replaced prior to the time an economic strike was converted into an unfair labor practice strike were not entitled to the status of unfair labor practice strikers.[1] That holding, however, does not, as the court below supposed, mean that strikers who have not been permanently replaced prior to the time a strike is converted into an unfair labor practice strike continue thereafter to be subject to the risk of permanent replacement. As the Third Circuit specifically noted (397 F.2d at 964), "the policy underlying the remedy of reinstatement [for unfair labor practice strikers] is that an employer who engages in

[1] While Frick does not treat with the point, the rationale of *Fleetwood Trailer* establishes that if an economic striker's permanent replacement vacates his job after the strike has become an unfair labor practice strike, the striker would, at that point, be entitled to the status of an unfair labor practice striker. For "if and when a job for which a striker is qualified becomes available, he is entitled to an offer of reinstatement." *Fleetwood Trailer*, 389 U.S. at 381. And during an unfair labor practice strike that entitlement to reinstatement is "unconditional." *Remington Rand* 130 F.2d at 928. Thus the striker would have precedence over any subsequent replacement.

unfair labor practices, and not the strikers, should suffer the consequences if the strike should be prolonged by the unfair labor practice," and it ordered reinstatement for "any striker who had not been replaced as of" the date the strike became an unfair labor practice strike (*ibid.*).

Thus, "the limit of the risk an employee runs by striking (*Industrial Cotton Mills*, 208 F.2d at 91) is permanent replacement during an economic strike. The purpose of the *Remington Rand-Mastro Plastics* doctrine is to lift that risk from his shoulders at the point at which an economic strike is converted into an unfair labor practice strike. And, of course, the discriminatory discharge of an economic striker cannot operate to increase that risk. Because it is a violation of §§ 8(a)(1)&(3) such a discharge is a legal nullity which can not defeat a striker's right to replacement guaranteed by the Act.

In short, prior to their discharge the striker-discriminatees in the instant case stood in precisely the same position as any other unreplaced economic striker. Their discharge did not reduce their position or impose any legal disability upon them. But it did serve to convert an economic strike into an unfair labor practice. After it had done so, a subsequent permanent replacement could not defeat the striker-discriminatees "unconditional" right to reinstatement (*Remington Rand*, 130 F.2d at 928), any more than permanent replacement could defeat the right of any other previously unreplaced striker taking part in an unfair labor practice strike. Thus, the Employer's refusal to reinstate them when they applied for their jobs after the strike had been converted into an unfair labor

strike was an additional violation of §§ 8 (a)(1)&(3) for which reinstatement is the proper remedy under *Mastro Plastics.*[3]

[3] In its Answer to the Petition for Certiorari the Employer sought to raise the contention that the strike was unprotected activity since its purpose was to require immediate recognition while a petition for a representation election was pending. This contention is not open on this record. For the Court of Appeals held that the purpose of the strike was not to compel immediate recognition but "to pressure the company into holding a consent election." Pet App. 23. And the Employer apparently concedes, as it must (Pet. App. 23), that a strike for that purpose is protected by § 7.

Moreover this defense is without substance. The Board was clearly correct when it held (Pet. App. 39-40):

> "There is nothing unlawful or against public policy in employees striking for . . . immediate recognition . . . when no other union has been certified.[10] Moreover, the strike does not lose the protection of the Act merely because the Union did not present beforehand a specific demand upon the Respondent for recognition. The Supreme Court, has stated unequivocally that the language of Section 7 is 'broad enough to protect concerted activities whether they take place before, after, or at the same time' a demand is made.[11] Nor are we here concerned with the reasonableness of or the justification for the decision to strike. It is settled law that the wisdom or unwisdom of a strike, the justification or lack of it, does not alter its status as a protected activity.[12]

[10] *Philans Oldsmobile, Inc.*, [137 NLRB 867,] 869.

[11] *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9, 14. However, prior to striking the Union had, as previously indicated, filed a petition limited to Respondent's employees, and copies of such petition had been served upon the Respondent which thus knew the Union claimed to represent its employees.

[12] *N.L.R.B.* v. *MacKay Radio and Telegraph Co., Inc.*, 304 U.S. 333, 344."

Indeed, while the Board law is confused, compare *Wilder Mfg.*

CONCLUSION

The judgment of the court below should be reversed insofar as it denies enforcement of the provisions of the Na-

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Co., 185 NLRB No. 76, with *Linden Lumber Division*, 190 NLRB No. 116, under this Court's decisions a majority strike for recognition is not simply concerted activity but "a remedy parallel with recourse to the Labor Board" (*Remington Rand* 94 F.2d at 871), for a refusal to bargain in violation of § 8(a) (5). For, as stated in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 596-597:

> "A union [seeking recognition] is not limited to a Board election . . ., for, in addition to §9, the present Act provides in §8(a)(5) (29 U.S.C. §158(a)(5) (1964 ed.)), as did the Wagner Act in §8(5), that "it shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)," Since §9(a), in both the Wagner Act and the present Act, refers to the representative as the one "designated or selected" by a majority of the employees without specifying precisely how that representative is to be chosen, it was early recognized that an employer had a duty to bargain whenever the union representative presented "convincing evidence of majority support." Almost from the inception of the Act, then, it was recognized that a union did not have to be certified as a winner of a Board election to invoke a bargaining obligation; it could establish majority status by other means under the unfair labor practice provision of §8(a)(5) —by showing convincing support, for instance, by a union-called strike . . .
>
> We have consistently accepted this interpretation of the Wagner Act and the present Act . . . See e.g., *NLRB* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 339-340 (1940); *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1943); *United Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62 (1956). Thus, in *United Mine Workers*, *supra*, we noted that . . . "[i]n the absence of any bona fide dispute as to the existence of the required majority of eligible employees, the employer's denial

tional Labor Relations Board's order requiring that Richard Dicus, Manuel and Robert Vasquez, and Salvidor Casillas be reinstated with back pay.

Respectfully submitted,

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of recognition of the union would have violated §8(a)(5) of the Act." 351 U.S. at 69."

Thus, while *Gissel* leaves open the question of the extent to which an employer may "reject a card-based bargaining request" (395 U.S. at 601, n.18), it squarely reaffirms the proposition that an employer violates the Act when he refuses to recognize a union which has proved its "majority support" by the "convincing evidence" of a successful recognition strike. The Employer's argument therefore provides him no protection; instead it demonstrates the existence of a further ground for the conclusion that the strike here was an unfair labor practice strike.